83-5942

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF THE
STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER STATE POLICE AND FIRE INVESTIGATORS VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ENTERING AND SEARCHING PETITIONER'S RESIDENCE WITHOUT A WARRANT FOUR HOURS AFTER A FIRE IN ONE ROOM OF THE RESIDENCE HAD BEEN EXTINGUISHED.

2. WHETHER THIS COURT'S DECISION IN MICHIGAN V. TYLER, 436 U.S. 499 (1978), SHOULD BE APPLIED IN JUDGING THE CONSTITUTIONALITY OF A CONVICTION THAT BECAME FINAL BEFORE MICHIGAN V. TYLER WAS DECIDED.

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of Criminal Procedure. On July 20, 1983, the Superior Court denied petitioner's motion for rehearing. Thereafter, petitioner timely filed a petition for review in the Arizona Supreme Court. That court denied discretionary review on October 18, 1983. Petitioner filed this petition for a writ of certiorari on December 16, 1983.

This Court has jurisdiction to review the decision of the Maricopa County Superior Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Procedural History

In the early morning hours of November 16, 1973, petitioner John Henry Knapp's two daughters perished in a fire that occurred in the Knapp residence. Petitioner was charged with the first-degree murder of his daughters and was eventually convicted in November of 1974, following one trial which ended in a hung jury. Throughout both trials, and in every subsequent proceeding, petitioner has maintained his innocence of any wrongdoing in the death of his daughters.

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On January 6, 1975, petitioner was sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence on March 9, 1977, and this Court denied certiorari. State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978). Petitioner's case was subsequently remanded to the trial court for resentencing in the aftermath of State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), which struck down Arizona statutory limitations on the presentation of mitigating evidence in capital sentencing. On remand, a motion for postconviction relief was heard and determined concurrently with resentencing, pursuant to Arizona Rule of Criminal Procedure 32. Knapp's postconviction relief petition was confined to newly discovered evidence probative of his innocence. All relief was denied, and Knapp was again sentenced to death. The Arizona Supreme Court again affirmed the trial court's disposition. State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), supplemented, 127 Ariz. 65, 618 P.2d 235 (1980).

On February 25, 1983, Knapp initiated a second petition for postconviction relief in Maricopa County Superior Court. The Arizona Supreme Court stayed petitioner's execution pending final disposition of the postconviction proceeding. Among the issues raised in the petition was a challenge to the use at trial of evidence seized by police and fire investigators in a series of warrantless searches of petitioner's residence. Petitioner requested an evidentiary hearing to determine facts critical to the search and seizure question. On June 16, 1983, the Superior Court denied the petition with a brief opinion. The court neither conducted an evidentiary hearing nor heard oral argument. It disposed of petitioner's Fourth Amendment claims with the statement that "this issue does not form the

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basis for relief for defendant." No further explanation appeared in the court's opinion.

Petitioner sought rehearing in the Superior Court, arguing among other matters that the court erred in rejecting his challenge to the warrantless searches of his residence. The Superior Court denied rehearing without opinion.

Following denial of rehearing in the trial court, Knapp filed a petition for review in the Arizona Supreme Court, which under Arizona law has exclusive jurisdiction over all appeals in capital cases. The petition sought to invoke the discretionary jurisdiction of that Court. Petitioner again challenged the State's use of evidence seized in warrantless searches of his residence on the day of the fire and during succeeding weeks. On October 19, 1983, the Arizona Supreme Court denied discretionary review of the Superior Court's judgment without opinion, with Justice Stanley G. Feldman voting to grant the petition and hear full argument.

B. Facts Material to the Questions Presented

The fire at the Knapp residence broke out in the children's bedroom sometime after 8:00 on the morning of November 16, 1973. 10/23/74 R.T. at 40. 56, 64. Firemen began arriving at the residence at approximately 8:30 and had extinguisned the blaze in the space of three to four minutes. 10/23/74 R.T. at 80, 10/24/74 R.T. at 58. The firemen then began conducting clean-up operations. A police fire inspector, James McDaniel, and a photographer arrived at the residence at approximately 10:30 a.m. and began to conduct a preliminary investigation. 10/23/74 R.T. at 30, 10/28/74 R.T. at 4. A deputy fire marshall, David Dale, joined the first investigator at approximately 12:55, nearly four and one-half hours after the fire had been extinguished. 10/29/74 R.T. at 62-63, 65. The investigators then began to search the bedroom in which the

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fire occurred, examining debris from the fire by hand. At approximately 2:30 p.m., a Maricopa County sheriff's deputy, Leon Stratton, also arrived and joined in the search. 10/31/74 R.T. at 43. Although the record is not entirely clear, it appears that physical evidence which the State later introduced into evidence in support of its arson theory was seized during the course of this investigation. This evidence consisted of carpet samples and other debris, which state experts later examined for proof of arson. None of the investigators had obtained a warrant or petitioner's consent prior to their search.

A detective from the Maricopa County Sheriff's Office conducted a second search three days after the fire, and possibly thereafter, and seized a Coleman fuel can and Coleman lantern, also introduced in evidence against petitioner at trial. 10/31/74 R.T. at 44-47. The sheriff's deputy also acted without obtaining a warrant or petitioner's consent.

Sometime during the day of the fire, the investigators contacted a local justice of the peace, Leo S. Coombs. Acting as coroner, Judge Coombs directed the deputies to "seal" the house and conduct an investigation. At various times thereafter he gave his "permission" for state investigators to reenter the premises. However, Judge Coombs testified at pretrial hearings that at no time during the day of the fire or thereafter did he issue a search warrant based on probable cause. 8/6/74 R.T. at 98-99.

Prior to trial, the defense moved to suppress all evidence seized after the day of the fire on Fourth Amendment grounds. At the suppression hearing, the trial court questioned whether an evidentiary hearing was necessary. Defense counsel responded that the defense did not have a complete list of all of the evidence seized from the house, nor did the existing

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record indicate when each item was removed. 8/7/74 R.T. at 95. The court, however, decided to postpone any inquiry into these details until it had determined whether the searches were constitutionally valid -- apparently on the theory that such a determination would not hinge on facts concerning the precise chronology of the searches or facts concerning the circumstances of each seizure. 8/7/74 R.T. at 96.

At the hearing, the State maintained that fire investigators and police officers had properly seized the entire house as State's evidence. Since the entire house and its contents were "State's evidence," 8/7/74 R.T. at 139, petitioner had forfeited whatever expectations of privacy he had once enjoyed. 8/7/74 R.T. at 141. The State introduced no evidence that the Knapps had "abandoned" the residence at the time of the challenged searches, or had otherwise consented to them.

Because of the nature of the State's arguments, the court heard no evidence as to (a) whether the search conducted hours after the fire had occurred was justified by exigent circumstances associated with the fire itself, or (b) whether evidence observed by firemen during the course of extinguishing the blaze was in "plain view."

After taking the matter under advisement, the trial court denied petitioner's motion to suppress. The trial judge explained from the bench his conclusion that police had properly taken possession of the premises as evidence, and that since the Knapps had not lived in the premises after the fire, no search warrant was necessary. 8/8/74 R.T. at 3.

Petitioner was subsequently convicted and his conviction was affirmed on appeal. Petitioner did not raise his Fourth Amendment claims on direct appeal. He raised them for the first time in his state postconviction petition, filed under

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Rule 32 of the Arizona Rules of Criminal Procedure. Petitioner relied in part on this Court's decision in Michigan v. Tyler, 436 U.S. 499 (1978).

In response, the State argued, among other matters, that Michigan v. Tyler should not be applied retroactively.

As noted earlier, the Superior Court considered the Fourth Amendment issue on the merits and denied relief, but without explanation.

ARGUMENT

I. STATE FIRE INVESTIGATORS VIOLATED PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THEY CONDUCTED WARRANTLESS SEARCHES OF HIS RESIDENCE WITHOUT PROOF THAT EXIGENT CIRCUMSTANCES EXCUSED COMPLIANCE WITH THE WARRANT REQUIREMENT.

The Fourth Amendment to the federal constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961), prohibits unreasonable searches and seizures. This Court has repeatedly held that warrantless searches, conducted without the defendant's consent, are presumptively unreasonable:

> "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well delineated exceptions.

Katz v. United States, 389 U.S. 347, 357 (1967).

The "mandate of the Fourth Amendment" referred to by the Court applies with particular force to searches of homes, for the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972). The Court has recently reaffirmed this uncompromising mandate: "It is a 'basic principle of Fourth Amendment law'

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that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980). As a consequence, a State bears the burden of establishing that a warrantless search is otherwise reasonable under the Fourth Amendment. E.g., United States v. Jeffers, 342 U.S. 48, 51 (1951); Wilson v. Health & Hospital Corp., 620 F.2d 1201, 1208 (7th Cir. 1980) (search incident to investigation of fire).

In the suppression hearing preceding petitioner's trial, the State argued that because fire department officials had properly entered the dwelling to extinguish the blaze and had later seized the entire home as "State's evidence," petitioner lost any expectation of privacy he once enjoyed. The trial judge apparently agreed with this reasoning, and emphasized the additional fact that petitioner and his wife no longer occupied the house after the fire.

In a decision handed down after petitioner's conviction became final, this Court squarely rejected the reasoning advanced by the State and relied on by the trial court, and held that failure to comply with the warrant requirement is not excused simply because a fire has occurred in the residence subsequently searched. Michigan v. Tyler, 436 U.S. 499 (1978). In Tyler, respondents had been convicted in state court of conspiring to burn their furniture store. Police and fire officials had gathered incriminating evidence during three warrantless searches of the burned premises.

The first search occurred during and immediately after efforts to extinguish the fire. The second occurred four hours after the fire had been extinguished and after the inspectors had left and then returned to the premises. The third occurred almost four weeks after the fire. The State argued that if respondents had set the fire, they had effectively abandoned

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the premises and that, if innocent, they would not be aggrieved by an intrusion into what little remained of their expectations of privacy in the structure.

This Court forcefully rejected the State's theory:

> [T]here is no diminution of a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. And under that Amendment, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

436 U.S. at 506 (quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967)).

Applying traditional Fourth Amendment principles to the case before it, this Court held that the first search, conducted during and immediately after the fire, was "reasonable," notwithstanding the absence of a warrant, because the fire presented exigent circumstances necessary to justify a warrantless entry; once in the building, the firemen could seize evidence in "plain view." 436 U.S. at 509.

In addition, the Court established a rule permitting fire officials to "remain in the building for a reasonable time to investigate the cause of the blaze after it has been extinguished." Id. at 510. The purpose of this exception was twofold: to allow prompt action "to prevent [the fire'] recurrence" and "to preserve evidence from intentional or accidental destruction." Id. at 510.

In light of this rule, the Court held that the search conducted four weeks after the fire was clearly removed from

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the initial exigency and thus was clearly invalid absent a warrant or consent. Id. at 511.

As to the second search, conducted in the early morning four hours after the fire was extinguished, the Court emphasized that state officials had departed solely because visibility was hindered by darkness, steam and smoke. The Court concluded, therefore, that the second search was "no more than an actual continuance of the first." Id. at 511. The second search, therefore, was also justified by the exigency that excused the first. Ibid.

In sum, Tyler held that although the occurrence of a fire provides exigent circumstances justifying a warrantless entry into a burning building, and although firemen may seize evidence in plain view during the course of extinguishing the fire, the exigency ceases once the blaze has been extinguished and fire officials have taken steps both to assure that it will not rekindle and to prevent the imminent destruction of evidence. Thereafter, the normal requirements of the warrant clause must be observed before further investigation can occur. Id. at 509-11.

In this case the first fire investigator did not arrive on the scene until two hours after the blaze had been extinguished. Deputy Fire Marshall Dale did not arrive until nearly four and one-half hours after the fire had been put out, and six hours had elapsed before Sheriff's Deputy Stratton entered the residence. None of these men obtained warrants and there is absolutely no evidence in the record that exigent circumstances continued to exist during the times of these entries and searches. Clearly, no exigent circumstances existed three days after the fire, when Deputy Stratton returned to seize the Coleman fuel can and Coleman lantern.

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At a minimum, petitioner is entitled to an evidentiary hearing to determine the following issues: (1) What evidence was actually seized the day of the fire, by whom, and at what time; (2) did exigent circumstances continue to exist at the time of those searches and seizures; (3) was the evidence seized in plain view. Neither the trial court, nor the Superior Court in petitioner's postconviction proceeding, saw any need to conduct such an evidentiary hearing, notwithstanding the fact that the State, and not petitioner, bore the burden of putting evidence in the record to justify its warrantless intrusions.

In the postconviction proceedings below, the State argued that the trial court found that petitioner had abandoned his residence at the time of the searches. First, under Arizona property law, abandonment requires proof that the premises were vacated "with intent to relinquish all rights therein." Gangadean v. Erickson, 17 Ariz. App. 131, 495 P.2d 1338, 1340 (1972). The trial judge in this case merely found that neither John nor Linda Knapp returned to the premises after the fire. He did not find that they had "abandoned" the premises for purposes of the Fourth Amendment, and indeed, the Assistant County Attorney prosecuting the case expressly disavowed any intention to argue abandonment. 8/7/74 R.T. at 138. Further, as the Tyler court recognized, privacy interests remain even if the residents no longer occupy the premises. 436 U.S. at 505-06.

Second, there was certainly no evidence of abandonment on the day of the fire, when the most thorough searches occurred. Indeed, petitioner and his wife had been absent from the premises only three or four hours before the warrantless searches began. Their mere absence for that period of time could not possibly give rise to a reasonable inference of

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abandonment. Moreover, the State's abandonment argument rings particularly hollow in light of the fact that the State purported to seize and seal the entire house as "State's evidence," thus involuntarily evicting its occupants.

No state court in Arizona has yet permitted petitioner the opportunity of an evidentiary hearing to test the lawfulness of the searches of his home. No state court has yet provided a convincing reason to justify the State's warrantless entries, searches, and seizures the day of the fire. Indeed, the decision of the Superior Court below directly conflicts with this Court's decision in Michigan v. Tyler, supra, and with earlier decisions recognizing the presumptive invalidity of warrantless residence searches. Nevertheless, the State is fully prepared to take petitioner's life without a full airing of this issue.

In light of this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), it is unlikely that petitioner will be permitted to argue his Fourth Amendment claims to a federal district court on a petition for a writ of habeas corpus. Because the legal question is substantial, because the decision below conflicts with a decision of this Court, and because petitioner's life hangs in the balance, this Court should grant certiorari to review the Superior Court's decision upholding the warrantless searches of his home.

At a minimum, this Court should hold this petition until it has handed down its decision in Michigan v. Clifford, No. 82-357, cert. granted, 51 U.S.L.W. 3545 (Jan. 24, 1983), and then grant, vacate and remand the lower court judgment for further consideration in light of Clifford.

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II. BECAUSE MICHIGAN V. TYLER DID NOT CREATE A CHANGE IN THE LAW, NO FEDERAL QUESTION OF RETROACTIVITY ARISES, AND CONSEQUENTLY TYLER SHOULD BE APPLIED IN JUDGING THE VALIDITY OF THE WARRANTLESS SEARCHES IN THIS CASE.

In the postconviction proceedings below, the State argued that petitioner's Fourth Amendment claims relied almost entirely on this Court's decision in Michigan v. Tyler, supra, and that because Tyler was decided after petitioner's conviction became final, Tyler should not be applied retroactively. Petitioner responded to this argument in its reply memorandum below, and again in its motion for rehearing. Because the Superior Court did not explain its denial of petitioner's Fourth Amendment claims, the court could have based its judgment on the State's retroactivity argument, and denied relief on the ground that Michigan v. Tyler should not be applied retroactively.

Such a judgment conflicts with this Court's decision in United States v. Johnson, 102 S. Ct. 2579 (1982), and its predecessors governing federal questions concerning retroactivity. Alternatively, this Court should grant certiorari to clarify the standards governing the circumstances under which retroactivity questions may properly arise in the application of federal precedents.

As this Court has previously held, no question of retroactivity arises unless the new decision declares a rule that represents "a clear break with the past." Desist v. United States, 394 U.S. 244, 248 (1969), causing "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one," Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 498 (1968). This Court declared just two Terms ago that

> when a decision of this court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply

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> retrospectively. In such cases, it has been a foregone conclusion that the rule of the later cases applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

United States v. Johnson, 102 S. Ct. 2579, 2587 (1982).

If a new constitutional decision does not overrule one of this Court's past precedents and does not disapprove a practice arguably sanctioned by the Court on prior occasions, a retroactivity question arises only if the new decision "overturns a longstanding and widespread practice . . . which a near-unanimous body of lower court authority has expressly approved." Id. at 2588.

Tyler does not fall into this category. Prior to Tyler this Court had never intimated, much less held, that fire investigators were permitted to remain on the premises for an indefinite length of time, without a warrant, in order to gather evidence of a crime. Indeed, the Court held as early as 1967 that the Fourth Amendment prohibited fire inspectors from making warrantless entries into private dwellings or commercial structures even in order "to locate and abate a suspected public nuisance, or simply to perform routine periodic inspection." Tyler, supra, 436 U.S. at 504-05 (summarizing Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967)). The Court had also repeatedly held that investigators could not enter a house to search for evidence of a crime without obtaining a warrant or demonstrating emergency circumstances sufficient to excuse compliance with the warrant requirement. See Tyler, supra, 436 U.S. at 509-10; United States v. Johnson, supra, 2589 n.13 (citing venerable Supreme Court decisions barring warrantless entries into homes).

Tyler did not represent a sharp break with prior law. It "merely has applied settled precedents to [a] new and different

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factual situation[]." United States v. Johnson, 102 S. Ct. at 2587. In this case, Tyler merely confirmed what existing Fourth Amendment decisions indicated at the time of the search, that the trial court erred in permitting introduction against petitioner of evidence seized in warrantless searches of his residence. No question of retroactive application need be considered.

In the lower court the State argued that Michigan v. Tyler did work a sharp break in the law because it overruled Arizona law, which at the time of the searches approved warrantless, contemporaneous searches of the scene of a homicide. See State v. Sample, 107 Ariz. 407, 487 P.2d 44 (1971); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974). See also Mincey v. Arizona, 437 U.S. 385 (1978) ("murder scene" exception).

First, Michigan v. Tyler simply did not concern the "murder scene" exception. Indeed, the fire in Tyler merely caused property damage in a commercial structure. Consequently, it did not represent a break with even Arizona authority concerning searches of a murder scene. Moreover, the trial judge in this case did not rely on the "murder scene" exception in overruling petitioner's motion to suppress. He relied instead on his perception that the Knapps no longer occupied the premises, and the State's declaration that it had seized the entire house as evidence. See 8/8/74 R.T. at 3. In fact, the trial judge concluded that if the Knapps had remained in the residence after the fire, search warrants would have been necessary. Id.

Second, as this Court recognized in United States v. Johnson, supra, 102 S. Ct. at 2588, if a new constitutional decision does not overrule one of this Court's past precedents and does not disapprove a practice arguably sanctioned by the Court on prior occasions, a retroactivity question arises only

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if the new decision "overturns a longstanding and widespread practice . . . which a near-unanimous body of lower court authority has expressly approved." The cases cited by the State below do not constitute a "near-unanimous body of lower court authority" approving warrantless searches once the exigency of a fire has passed.

Third, the "murder scene" exception established in Sample did not represent a "near-unanimous" wall of authority even within the confines of Arizona. In 1972, the United States Court of Appeals for the Ninth Circuit disapproved of the "murder scene" exception in a habeas case filed by the very defendant whose conviction had been upheld in State v. Sample, thereby establishing the federal rule to be followed in Arizona. See Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972). Of critical importance, this split of state and federal authority had fully matured well before the fire that occurred in the Knapp residence in November 1973. See State v. Duke, supra, 518 P.2d at 574.

Fourth, even if the "murder scene" exception had been the basis for the trial court's denial of the suppression motion, and even if it had enjoyed the "near-unanimous" support of lower court authority, Tyler still would not have represented a break in the law. State v. Duke, supra, on which the State relies, limited application of the murder scene exception to "a contemporaneous warrantless search of the scene of a crime at the time of the discovery of the body." 518 P.2d at 574. In distinguishing the Ninth Circuit decision in Sample, the Duke court necessarily implied that a warrantless search following discovery of the murder victim by only two hours would be outside the exception, and consequently unconstitutional. As noted in petitioner's application, the critical searches in

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this case occurred over four hours after the fire had been extinguished and the bodies removed.

Finally, the Court should be aware of the significant character of the State's argument: It is that a federal retroactivity question arises whenever a decision of this Court implicitly disapproves of decisions in the forum state which arguably sanctioned the unconstitutional conduct. As explained above, that argument is for several reasons unconvincing in the context of this case. Nevertheless, the state court may well have accepted the argument in rejecting petitioner's application for postconviction relief. As petitioner has explained, this issue is independently worthy of a grant of certiorari: whether a state may deny effect to a new decision of this Court merely because it implicitly disapproved of certain judicial decisions within that state, despite the fact that it did not work a break in the law established by this Court and other lower courts.

CONCLUSION

The decision of the Maricopa County Superior Court rejecting petitioner's constitutional claims is erroneous and is in conflict with decisions of this Court. Indeed, the judgment of the Superior Court, rendered without benefit of an evidentiary hearing or even oral argument, is so perfunctory as to suggest that petitioner has not yet received a full and fair hearing on his federal claims in any forum. The questions raised are substantial, as are the consequences of an erroneous judgment. To prevent the forfeiture of petitioner's life, along with his federal constitutional rignts, petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the Maricopa County Superior Court in this case.

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Mariscal, Weeks, McIntyre & Friedlander

DATED this 16th day of December, 1983.

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AFFIDAVIT OF SERVICE

JAMES E. SCARBORO, being first duly sworn, upon his oath deposes and says:

That he is a member of the Bar of this Court and that in accordance with Rule 28.2, Supreme Court Rules, the following documents were deposited in a United States post office for mailing, with first-class postage prepaid, to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and to Crane McClennen, Asst. Arizona Attorney General, 1275 West Washington, Second Floor, Phoenix, Arizona 85007, on this 16th day of December 1983:

(a) Motion for Leave to Proceed in Forma Pauperis;

(b) Petition for Writ of Certiorari to the Maricopa County Superior Court of the State of Arizona;

(c) Affidavit of Service.

James E. Scarboro

SUBSCRIBED AND SWORN to before me this 16th day of December, 1983, by James E. Scarboro.

Notary Public

My Commission Expires:

May 5, 1987

MARSON, MEYER HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION
2700 NORTH THIRD STREET
SUITE 4000
PHOENIX, ARIZONA 85004

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS

BONDS - REFUND

FORFEITURE

CHANGE OF VENUE

JURY FEES

REWARDS

SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE
Div. DATE JUDGE OF COMMISSIONER Clerk
K. Dollins
Deputy

CR 78779

STATE OF ARIZONA

vs.

JOHN HENRY KNAPP

Attorney General
by: Crane McClennan

James E. Scarboro/Larry A. Hamm
Mark S. Wallace/Parker C. F.

Having been submitted for initial review pursuant to Rule 32, the Court has carefully read the petition, the response and the reply. The Court has also reviewed the court files in the matter.

Defendant alleges the trial court erred in refusing to allot funds to defendant's expert to ~~XXX~~construct a full scale replica of the room in which the fire took place. PUrsuant to Rule 32, defendant is precluded from now raising this issue as it was raised in his fifth appeal and decided adversely to defendant's position.

Defendant alleges the trial court erred in excluding evidence of the experiments conducted by defendant's expert. This matter was carefully addressed on the record by the trial court and the ruling could have been tested on appeal. It is now waived by failur to raise on appeal or precluded by having been already decided.

Defendant contends that it is the combination of the foregoing two alleged errors that is itself the error. These matters were known to defendant at the time of the appeal and the first PCR. The matters are carefully documented in the record. Defendant has waived this argument by failing to timely raise it heretofore.

Defendant alleges this confession was not voluntary. This issu was raised in defendant's first appeal and the Court decided against him. He is now precluded from raising this issue.

Defendant alleges the evidence was illegally seized from the trailer after the date of the fire and that he has not waived this issue because there has been a change in the law since his trial. A careful review of the record shows only two items seized after the day of the fire - a full can of Coleman fuel from the living room and the Coleman lantern found in the bathroom. Pictures of these items were taken in place on the day of the fire and the

(continued)

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

DISTRIBUTION

APPEALS

BONDS REFUND

FORFEIT

CHANGE OF VENUE

JURY FEES

REMANDS

SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, Clerk
K. Dollins, Deputy

CR 78779 STATE v. KNAPP (continued)

pictures were admitted without objection. Many witnesses described the items having seen them during and immediately after the fire. The testimony was without objection. Even if seized illegally, a fact which need not be decided here, the admission of the items themselves was harmless in view of the pictures and the testimony.

Defendant alleges the items seized the day of the fire were illegally seized. This issue was raised initially in writing in the trial court but abandoned during argument and never again raised until this PCR. There is no issue of fact in dispute as to the ~~XX~~items and times of seizure and circumstances of seizure and a study of the authorities cited in the arguments made herein does not favor defendant's position and thus this issue does not form the basis for relief for defendant.

Defendant alleges the Arizona Supreme Court did not conduct an appropriate review of his sentence as it failed to make a peoportio: review. This Court has no jurisdiction to rule that the Arizona Supreme Court erred. A review of both opinions indicates the Court knew what its job was and set about doing it.

As to his contentions regarding errors in sentencing, defendant alleges:

1. The Arizona Supreme Court failed to conduct a proportionali review - both where the death penalty was imposed, as well as where there was a life sentence. The record has been quoted extensively by both parties from the record on each of the appeals herein. The Supreme Court obviously knew its job, did it as it saw it and this trial court is in no legal position to take issue with its findings.

2. The Arizona Capital sentencing statute is constitutionally infirm because: (a) it does not provide adequate guidance to the trial court in imposing sentence. Gretzler rule to the contrary. (b) for failure to require the State to prove beyond a reasonable doubt that ~~XX~~aggravating factors exist and outweigh the mitigating factors. The law does not support this allegation. (c) it requires t death penalty if the State proves one or more aggravating factors an defendant is unable to show sufficient mitigating factors. The law

(continued)

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS

BOND ON APPEAL

FORFEITURE

CHANGE OF VENUE

JURY FEES

REMANDS

SENTENCING

10 | June 16, 1983 | HON. MARILYN A. RIDDEL | VIVIAN KRINGLE, R. Dollins

CR 78779 | STATE v. KNAPP | *(continued)

clear and supports the constitutionality of this statute.

3. The sentencing court's failure to consider doubt as to defendant's guilt as a mitigating factor. The record in this regard is lengthy and clear. The sentencing judge did not feel that he could consider this matter as a mitigating factor, but stated that even if he could, he did not consider the matter mitigating. The matter was squarely before the ~~XXXXXXX~~ appellate court on appeal and is not now properly raised in a Rule 32 proceeding.

4. The sentencing court erred in finding defendant acted in a heinous, cruel or depraved manner under the Arizona definition. This claim has been rejected in Gretzler and the appellate decision herein.

5. The capital sentencing statute is unconstitutional for failure to establish the burden of proof. Inasmuch as the state proved the aggravating factor "burning a child to death" beyond a reasonable doubt and the sentencing court found this to be "heinous cruel or depraved" and the appellate court agreed, this issue does not apply in this case.

6, 7 and 8. The defendant had a right to sentencing by a jury. This claim has been rejected in Gretzler.

Based upon the foregoing analysis, there is no questions of law or fact raised upon which defendant might obtain relief and ,

IT IS ORDERED denying defendant's petition for post conviction relief.

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

October 19, 1983

STATE OF ARIZONA,

Appellee,

vs.

JOHN HENRY KNAPP,

Appellant.

Supreme Court
No. 3106-2-PC

Maricopa County
No. CR-78779

The following action was taken by the Supreme Court of the State of Arizona on October 18, 1983 in regard to the above-entitled cause:

"ORDERED: Petition for Review - DENIED.
FURTHER ORDERED: Motion for Oral Argument - DENIED.
FURTHER ORDERED: The Stay heretofore entered is vacated.

Justice Stanley G. Feldman voting to grant both petition and motion."

Record on Petition for Post Conviction Relief returned to Maricopa County Superior Court this 19th day of October, 1983, to wit: Instruments (3 Parts); Minute Entries.

S. ALAN COOK, Clerk

By Kathleen E. Kemplay
Deputy Clerk

TO:
James E. Scarboro, Esq., Mark S. Wallace, Esq., and Parker C. Folse III, Esq., Martori, Meyer, Hendricks & Victor, 2700 North Third Street, Suite 4000, Phoenix, Arizona 85004
Hon. Robert K. Corbin, Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007 Attn: Crane McClennen
Thomas E. Collins, Maricopa County Attorney, 101 West Jefferson Street, Phoenix, Arizona 85003
Hon. Marilyn A. Riddell, Judge, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003
Vivian Kringle, Clerk, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003 (Certified Copy)
John Henry Knapp, Box B 33659, Arizona State Prison, Florence, Arizona 85232

APPENDIX II

83-5942

FILED
DEC 16 1983
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, John Henry Knapp, pursuant to Rule 46.1, Supreme Court Rules, asks leave to file the accompanying Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. The Petitioner was represented below without cost by Martori, Meyer, Hendricks & Victor. Petitioner has been incarcerated at The Arizona State Prison, Florence, Arizona, since January 1975. Petitionsr has attached hereto as Exhibit "A" his declaration in support of this request on a form supplied by The United State District Court, District of Arizona.

///

///

///

///

MARTORI, MEYER, HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION
2700 NORTH THIRD STREET
SUITE 4000
PHOENIX, ARIZONA 85004

Respectfully submitted: December 16, 1983.

MARTORI, MEYER, HENDRICKS & VICTOR

By (James E. Scarboro)

James E. Scarboro
Mark S. Wallace
Colin F. Campbell
2700 N. Third Street
Suite 4000
Phoenix, Arizona 85004

Attorneys for Petitioner

MARTORI, MEYER, HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION
2700 NORTH THIRD STREET
SUITE 4000
PHOENIX, ARIZONA 85004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

_____

vs.

_____

_____

_____

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, John Henry Kuhpp, declare that in support of my pleadings to proceed in the above entitled case without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to relief.

1. Are you presently employed? Yes ( ) No (X)
   a. If the answer is "yes," state the amount of salary or wages per month, and give the name and address of your employer:

   _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received:

   Evans Manufacturing Co., Houston, Texas, September-October 1974.
   $ 3.10/hour

2. Have you received within the past twelve months any money from any of the following sources:

	Yes	No
a. Business, profession, or form of self-employment?		X
b. Rent payments, interest, or dividends?		X
c. Pensions, annuities, or life insurance payments?		X
d. Gifts or inheritances?	X	
e. Any other sources?		X

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months:

   January 1983. Received gift of $35 from mother

   _____

   _____

   _____

3. Do you own cash or do you have money in a checking or savings account?
   Yes (X) No ( ) (Include any funds in prison accounts.)

(4/5/83)

If the answer is "yes," state the total value of the items owned:

$0.24

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ( ) No (✓)

If the answer is "yes," describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support:

None

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 11/4/83 (Date)

John H. Knapp
Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of $ .24 on account to his credit at the ASPC institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said None institution:

Date:

Authorized Officer of Institution

ORIGINAL

Supreme Court, U.S.
FILED
JAN 30 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-5942

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN HENRY KNAPP,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF ARIZONA

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
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Department of Law
1275 W. Washington, 2nd Floor
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Attorneys for RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

A. Does this court need to consider this petition?

B. Is petitioner entitled to relief based upon the seizure of evidence?

C. Is petitioner entitled to relief under Michigan v. Tyler?

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AUTHORITIES

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NO. 83-5942

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN HENRY KNAPP,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF THE STATE OF ARIZONA

I. STATEMENT OF THE CASE

On November 16, 1973, at 8:28 a.m., Rural Metro Fire Department received a call that a house at 7435 East Capri in Mesa was on fire. (R.T. of Oct. 23, 1974, at 30, 39, 55, 56, 64; R.T. of Oct. 24, 1974, at 56.) It took the firemen 2 minutes to get to the house. (R.T. of Oct. 23, 1974, at 39, 55, 56, 64; R.T. of Oct. 24, 1974, at 57.) Among the first firemen to arrive were Chief Geary Roberts, Monty Brow, Roy Skowron, and John Wilson. Upon arrival, they saw smoke coming out of one window of the house. (R.T. of Oct. 23, 1974, at 30, 54, 57, 64; R.T. of Oct. 24, 1974, at 57.) It took them about 3 to 4 minutes to put out the fire. (R.T. of Oct. 23, 1974, at 80; R.T. of Oct. 24, 1974, at 58.) At 8:35, Sheriff's Deputy John H. Chernko arrived. (R.T. of Oct. 23, 1974, at 80.) Upon entering the bedroom that had been on fire, Chief Roberts, Brow, Skowron, Wilson, and Deputy Chernko found the bodies

of Linda and Iona Knapp. (R.T. of Oct. 23, 1974, at 32, 58, 67, 75; R.T. of Oct. 24, 1974, at 59.) Chief Roberts, Brow, Skowron, Wilson, and Deputy Chernko all remained at the house until Fire Inspector James McDaniel and photographer Steve Hermann arrived. (R.T. of Oct. 23, 1974, at 35, 59, 61; R.T. of Oct. 24, 1974, at 42, 59, 62 80; R.T. of Oct. 28, 1974, at 11, 104; R.T. of Oct. 29, 1974, at 2.) At approximately 10:30 that morning, photographer Steve Hermann and fire inspector James McDaniel arrived. (R.T. of Oct. 23, 1974, at 30; R.T. of Oct. 28, 1974, at 4.) Steve Hermann took numerous photographs of the bedroom and other rooms prior to the removal of the bodies or any debris. (R.T. of Oct. 24, 1974, at 31-32, 36-37.) Under the direction of Inspector McDaniel, Chief Roberts, Row, Skowron, and Wilson removed the debris from the room while Hermann took photographs so that they could determine the cause of the fire. (R.T. of Oct. 23, 1974, at 35-36, 61, 69-70; R.T. of Oct. 24, 1974, at 32-41, 61-62, 79, 81; R.T. of Oct. 28, 1974, at 6-7, 104.) While removing the debris, several of the men noticed an oily film on top of the water in the room, but it was not until they had removed the carpet from the room and saw the burn marks on the floor that they began to suspect arson. (R.T. of Oct. 23, 1974, at 36, 61; R.T. of Oct. 24, 1974, at 42, 45, 61; R.T. of Oct. 28, 1974, at 11.) While they were removing the debris, the men took samples of the oily film, carpets, and wood. (R.T. of Oct. 23, 1974, at 59; R.T. of Oct. 24, 1974, at 63, 80; R.T. of Oct. 28, 1974, at 8.)

Early that morning, State Fire Marshall David Dale received a call from one of the fire chiefs asking if he would help in the investigation. (R.T. of Oct. 29, 1974,

at 65.) Dale said that he would do so only in response to a formal request. (Id.) Dale received another call at 12:15 p.m., and arrived at the home at 12:55. (Id.) By this time, the men there had collected all of the samples, so Dale conducted a visual examination of the home. (Id. at 65-66.) At approximately 2:30 p.m., Sheriff's Deputy Leon Stratton arrived, but he did not seize any evidence that day. (R.T. of Oct. 31, 1974, at 43, 55.)

Some time during the morning of the fire, one of the deputies called the justice of the peace Leo S. Coombs and told him of the deaths. (R.T. of Aug. 6, 1974, at 79.) That morning, Coombs had a full schedule and could not get out to the scene of the fire. (Id.) Acting as coroner, he directed the deputies to seal the house and to make a full investigation of the deaths. (Id. at 98-100.) The deputies called him on three different occasions on subsequent days and asked him for permission to go back into the house, which he authorized. (Id. at 98-99.) On October 19, 1974, Deputy Stratton reentered the house and seized a Coleman fuel can in the living room and a Coleman lantern in the bathroom, which were the only two items of evidence seized from the home after the day of the fire. (R.T. of Oct. 31, 1974, at 44-47.)

Prior to petitioner's trial, petitioner never moved to suppress any of the evidence seized the day of the fire; he moved only to suppress the evidence seized after the day of the fire, and moved to suppress his confession. (R.T. of Aug. 6, 1974, at 5; R.T. of Aug. 7, 1974, at 95.) The trial court denied both motions. (R.T. of Aug. 7, 1974, at 133; R.T. of Aug. 8, 1974, at 3.)

The jurors ultimately found petitioner guilty, and the trial court sentenced him to death. (R.T. of Jan. 6, 1975,

at 169.) On appeal, petitioner did not raise the issue of the seizure of the evidence after the day of the fire, but he did challenge the admission of his confession. The Arizona Supreme Court affirmed the judgment and sentence. State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977). The United States Supreme Court denied certiorari on the question of authorizing court funds to construct the full-scale replica of the children's room. Knapp v. Arizona, 435 U.S. 908 (1978). In 1978, petitioner filed a petition for post-conviction relief claiming newly-discovered evidence showing doubt about petitioner's guilt. Petitioner also had to be resentenced pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). The trial court denied the petition for post-conviction relief and resentenced petitioner to death. (R.T. of May 25, 1979, at 75, 80-81.) The Arizona Supreme Court affirmed both of these rulings. State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), and 127 Ariz. 65, 618 P.2d 235 (1980). In February 1983, petitioner filed a second petition for post-conviction relief, claiming among other things that all evidence seized from the house was seized unlawfully. The superior court ruled that, even if the Coleman can and lantern were seized unlawfully, admission of this evidence was harmless beyond a reasonable doubt, since numerous witnesses saw these items the day of the fire and testified about them. (Exhibit "B" at 1-2.) The superior court concluded that petitioner also was not entitled to relief based on the admission of evidence seized the day of the fire. (Exhibit "B" at 2.) The superior court denied petitioner's motion for rehearing, and the Arizona Supreme

Court denied review. (Exhibit "C.") This petition for writ of certiorari followed.

II. ARGUMENTS

A. THIS COURT DOES NOT NEED TO CONSIDER THIS PETITION.

One of the main reasons for the discretionary granting by this Court if petitions for writs of certiorari is to clarify the law for the lower courts. In Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and most recently in Michigan v. Clifford, 52 U.S.L.W. 4056 (U.S., Jan. 11, 1984), this Court spoke on the question of search and seizure of evidence after a fire. Because this Court has so recently spoken on this issue, there is no need to speak further and add anything further to the case law given.

B. PETITIONER IS NOT ENTITLED TO RELIEF BASED UPON THE SEIZURE OF EVIDENCE.

1. Petitioner has waived any issue concerning the seizure of evidence.

Petitioner contends that evidence used against him was seized in an unconstitutional, warrantless search. Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, precludes relief on any ground knowingly, voluntarily, and intelligently not raised at trial, on appeal, or in a previous collateral proceeding. On August 6, 1974, petitioner filed a motion to suppress all evidence seized on November 19, 21, and 23, 1973, by deputies of the Maricopa County Sheriff's Office. This motion was signed by David W. Basham and David W. Basham for Charles C. Diettrich. On August 6, 1974, Diettrich questioned Judge Leo S. Coombs in connection with the motion to suppress. (R.T. of Aug. 6, 1974, at 98-99.) On August 7, 1974, Basham stated that they were moving to suppress only those

items taken from the house after November 16, 1973, the day of the fire. (R.T. of Aug. 7, 1974, at 95.) Basham later argued the motion to the trial court. (Id. at 141-50.) The next day, the trial court denied the motion. (R.T. of Aug. 8, 1974, at 3.)

Prior to the second trial, Diettrich renewed the motion to suppress. (R.T. of Oct. 23, 1974, at 2-3.) During trial, Diettrich again renewed his motion to suppress any evidence seized after November 16, 1973. (R.T. of Oct. 31, 1974, at 45.) At the hearing on the motion for new trial, Diettrich argued that petitioner should receive a new trial because of the admission of evidence unconstitutionally seized. (R.T. of Jan. 16, 1975, at 111-12.) Diettrich filed a supplement to his motion for a new trial, wherein he again stated that petitioner should receive a new trial because of the admission of evidence seized after the date of the fire. (Supplement to Motion for New Trial, filed Jan. 9, 1975, at 1.) Diettrich later filed the briefs in the appeal on this conviction and sentence, but did not raise any issue about the admission of evidence seized from petitioner's house. (Opening Brief, filed July 1, 1975; Reply Brief, filed Aug. 25, 1975.) This shows that Mr. Diettrich made a decision at trial not to raise an issue about the admission of evidence seized the day of the fire, and made a decision on appeal not to challenge the seizure of any of the items of evidence. Because Diettrich never challenged the admission of items seized the day of the fire and because the only items of evidence seized after the date of the fire were a Coleman lantern found in the bathroom and a full can of Coleman fuel found in the living room, it appears that Diettrich concluded that this issue would not have been the basis for any relief for his

client, and therefore chose not to raise it. Because of the abandonment of this issue at trial and on appeal, petitioner is precluded from relief on this issue.

Petitioner's present claim for relief however, is based on Michigan v. Tyler, supra, which was not decided until 4 years after petitioner's trial. Rule 32.2(b), Arizona Rules of Criminal Procedure, provides that preclusion shall not apply to any claim based upon Rule 32.1(g), Arizona Rules of Criminal Procedure, which provides as follows:

> There has been a significant change in the law applied in the process which led to the petitioner's conviction or sentence, and there are sufficient reasons to allow retroactive applications of the changed legal standards.

If Michigan v. Tyler does not amount to a "significant change" in the law, then petitioner is precluded from raising this issue; if it does, then petitioner is entitled to relief only if Michigan v. Tyler should be applied retroactively. The retroactive application of Michigan v. Tyler will be discussed in subsection 2.

2. Michigan v. Tyler should be applied prospectively only.

Based upon Michigan v. Tyler, supra, petitioner contends that the trial court improperly admitted evidence seized from the house. That case held that firefighters do not need a warrant to enter a burning building, fight the fire, and remain in the building for a reasonable time to investigate the cause of the blaze. 436 U.S. at 509-10. At the time of the search in the present case, the law in Arizona was that authorities were permitted to make a warrantless, contemporaneous search of the scene of a homicide when the authorities were legally on the premises in the first instance. State v. Duke, 110 Ariz. 320, 324,

518 P.2d 570, 574 (1974); State v. Sample, 107 Ariz. 407, 409-10, 487 P.2d 44, 46-47 (1971). This holding is consistent with the cases the trial court considered in ruling on the motion to suppress. Steigler v. Anderson, 496 F.2d 793 (3d Cir.), cert. denied, 419 U.S. 1002 (1974); United States v. Garzotto, 476 F.2d 1009 (6th Cir. 1973), cert. denied, 421 U.S. 987 (1975); Stevens v. State, 443 P.2d 600 (Alaska 1968), cert. denied, 393 U.S. 1039 (1969); State v. Chapman, 250 A.2d 203 (Me. 1969); People v. Tyler, 50 Mich.App. 414, 213 N.W.2d 221 (1973), rev'd, 399 Mich. 564, 250 N.W.2d 467 (1977), aff'd, 436 U.S. 497 (1978); People v. Neulist, 43 App.Div.2d 150, 350 N.Y.S.2d 178 (1973); Tocher v. State, 501 S.W.2d 921 (Tex.Ct.Crim.App. 1973); Corbett v. State, 493 S.W.2d 940 (Tex.Ct.Crim.App. 1973), cert. denied, 414 U.S. 1131 (1974); Bennett v. Commonwealth, 212 Va. 863, 188 S.E.2d 215 (1972); Longuist v. State, 495 P.2d 575 (Wyo.), cert. denied, 409 U.S. 1006 (1972). This holding was subsequently limited by Michigan v. Tyler, supra, and was specifically rejected by Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), which relied heavily upon Michigan v. Tyler. The question then is whether Michigan v. Tyler and Mincey v. Arizona should be applied retroactively.

The first consideration in deciding whether to apply a rule retroactively is the purpose of the new rule. The purpose in Tyler and Mincey, as is the purpose of any exclusionary rule dealing with the seizure of physical evidence, is control of the activities of the authorities. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Because controlling the activities of the authorities means future activities only, new rulings on search and seizure questions have traditionally been

applied prospectively only. E.g., Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) (Mapp v. Ohio prospective only). For this reason, the rulings in Tyler and Mincey should be prospective only. The second consideration is reliance upon the old rule. Here we have authorities conducting their duties guided by court rulings, such as those in Sample and Duke. This again would indicate a prospective application only. The last consideration is the effect a retroactive application would have on the administration of justice. The effect would be that courts would reach into the past, hold inadmissible evidence that is not itself in any way unreliable (as an involuntary confession might be), and vacate an otherwise valid conviction. Again, there is no reason to have a retroactive application. For all of these reasons, Michigan v. Tyler and Mincey v. Arizona should be applied prospectively only, and this Court should not give petitioner any relief based upon these decisions.

Petitioner argues, however, that Michigan v. Tyler did not create a change in the law, so no question of retroactivity arises. The problem with this argument is that, if Michigan v. Tyler was the law at the time of the November 1973 search, then petitioner has waived this issue by failing to raise it at the trial and on appeal.

For further support, petitioner cites United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579, ___ L.Ed.2d ___ (1982). That case dealt with the question whether to apply Payton v. New York, 445 N.J. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), to cases pending on appeal at the time of the opinion in Payton. Because the Arizona Supreme Court decided petitioner's appeal long before this Court

issued its opinion in Tyler and the present review is of a denial of a collateral attack, Johnson is of limited value.

C. EVEN UNDER MICHIGAN V. TYLER, PETITIONER IS NOT ENTITLED TO RELIEF.

Relying upon Michigan v. Tyler, supra, petitioner contends that certain items of evidence were improperly seized, and admission of this evidence entitles him to a new trial. In that case, the United States Supreme Court stated the following:

> A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor by Chief See's removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.
>
> Although the Michigan Supreme Court appears to have accepted this principle, its opinion may be read as holding that the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame. We think this view of the firefighting function is unrealistically narrow, however. Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidential destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been

> extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

436 U.S. at 509-10 (citations and footnote omitted). In its statement of the facts, the Supreme Court noted that the fire started at about midnight; Fire Chief See arrived at 2:00 a.m. just as the fire was extinguished, and met with Lt. Lawson, who informed him that they had found two plastic containers containing flammable liquid indicating arson; See telephoned Police Detective Webb, who arrived at 3:30 a.m. and took photographs; everyone left by 4:00 a.m. with See and Webb taking the two containers; at 8:00 a.m. See and Assistant Chief Somerville returned and then left; at 9:00 a.m. Somerville and Webb returned and saw suspicious burn marks on the carpet; they left to get some tools and then returned and removed pieces of carpet and stairs, and searched through the rubble looking for any other signs or evidence that showed how the fire was caused. 436 U.S. at 501-02. The Supreme Court held that the fire inspectors and the police did not need a warrant for any of those activities conducted on the morning of the fire, but that they did need a warrant for any entries made into the building after the day of the fire. 436 U.S. at 511.

Petitioner notes that the fire was extinguished at 8:30 a.m., Inspector McDaniel did not arrive until 10:30 a.m., Fire Marshall Dale did not arrive until 12:55 p.m., and deputy sheriff Stratton did not arrive until 2:30 p.m.

Petitioner overlooks the fact that Chief Roberts arrived while the fire was still burning, and he remained at the house all day and assisted in the investigation. Brow, Skowron, and Wilson also arrived while the fire was

burning, and remained at least until Inspector McDaniel had conducted his investigation. Fire officials therefore remained in petitioner's house continuously from the initial fighting until the conclusion of the investigation that day, which makes this case even stronger than Tyler, where fire officials vacated the premises several times the morning of the fire. Further, the fact that the investigation did not begin until 10:30 a.m. is of no import, since this Court has never held that only the firemen who arrived while the fire is burning may search for the cause of the fire. The fact that at some point the investigators began to suspect arson is also of no import. The purpose of the investigation was to determine the cause of the fire and it was not until the investigators had removed the debris and the carpeting from the room did they suspect arson. As noted in the discussion of Tyler, supra, prior to 2:00 a.m. Lt. Lawson found plastic cointainers containing flammable liquid, which indicated arson, but this did not make unlawful the subsequent search occurring after 9:00 a.m. In Tyler this Court sanctioned a search conducted at least 8 hours after the fire was extinguished; in the present case, 8 hours after the fire would be 4:30 p.m., well after the arrival of the last inspector, Deputy Stratton. The present search the day of the fire was just as permissible here as it was in Tyler.

The ruling in Michigan v. Clifford, supra, does not change this result. In that case, this Court held that officials do not need a warrant to remain in the building for a reasonable time, but they do need one if they extinguish the blaze and then leave the premises. 52 U.S.L.W. at 4058. Because the officials here remained on the scene continuously, Tyler and not Clifford applies.

Petitioner contends, however, that he is entitled to a hearing to determine when he various items of evidence were seized. No such hearing is needed. Attached as Exhibit "A" is a list of all evidence admitted at trial, with transcript cites showing where each exhibit was identified and where it was admitted. Most of these exhibits are photographs, all of which were taken the day of the fire. Of the physical objects taken from the house, the only two that were taken after the day of the fire are Exhibit 50, the full can of Coleman fuel found in the living room, and Exhibit 51, the Coleman lantern found in the bathroom. (R.T. of Oct. 28, 1974, at 24-25; R.T. of Oct. 31, 1974, at 44-47.) These are the only two exhibits to which petitioner objected on the basis of being taken from the residence after the day of the fire. (R.T. of Oct. 31, 1974, at 45, 47.) For the following reasons, respondent submits that these pieces of evidence should not have been suppressed, and admission of them was not reversible error.

1. The coroner and the sheriff's office had seized the entire home as evidence. At the time of the deaths of Linda and Iona Knapp, the following statutes were in effect governing the duties of a justice of the peace:

> Each justice of the peace shall be ex officio coroner within his precinct. In his absence from the precinct, any other justice of the peace in the county may act as coroner therein.

Ariz.Rev.Stat.Ann. § 22-501 (repealed Laws of 1975, Ch. 114, § 8).

> When a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as afford reasonable ground to suspect that the death was occasioned by the act of another by criminal means, the coroner shall go to the place where the body is located, and forthwith summon not less than six nor more than twelve persons, qualified by law to serve as jurors, to appear before

> him forthwith at the place where the body of the deceased is located to inquire into the cause of the death.

Ariz.Rev.Stat.Ann. § 22-511 (repealed Laws of 1975, Ch. 114, § 8). This statute imposed upon Judge Leo S. Coombs the duty to hold an inquest into the deaths of Linda and Iona. Pursuant to this authority, on the day of the fire, he ordered the sheriff's office to seal the house and to make a full investigation for him. (R.T. of Aug. 6, 1974, at 98-100.) He gave permission over the telephone to various sheriff's deputies to go into the house to investigate the deaths. (Id. at 99-100.)

If authorities are lawfully on the premises, they may seize evidence that is in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In the present case, the entire house consisted of evidence of how the fire started. Because the authorities could not remove the entire house and place it in the property locker, they did the only thing they could -- seize it, seal it, and preserve it and all of its contents as evidence. As such, the entry on November 19, 1973, to obtain the Coleman can and Coleman lantern was not a search, and as such the sheriff's deputy did not need a warrant to do so. In this respect, the situation here differs from that in Tyler. In Tyler, the authorities left the building, and did not return until over 3 weeks later. Because this later entry was in no way connected with the original exigent circumstance that allowed the authorities to enter, this Court held that the authorities needed a warrant to reenter. But in the present case, because the authorities properly seized the entire house, their reentry was merely the removal of items already in their possession. Thus, no further warrant was necessary. See Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209

(1975) (when police have probable cause to search a vehicle when they arrest, they may seize the vehicle, take it back to the police station, and search it at their leisure).

2. Because John and Linda Knapp abandoned the premises, they have no standing to challenge the seizure of the Coleman can and Coleman lantern. A person has no standing to complain of a search or seizure of property he has voluntarily abandoned. State v. Walker, 119 Ariz. 121, 126, 579 P.2d 1091, 1096 (1978). In the present case, the trial court found that John and Linda never lived in the premises after the time of the fire. (R.T. of Aug. 8, 1974, at 3.) They thereby abandoned it. As such they cannot complain of the seizure of the property in question.

3. Because the sheriff's deputies acted in good faith, this Court should not suppress the Coleman can and the Coleman lantern. This Court presently has pending before it several cases involving the "good faith" exception to the warrant requirement. The basis of this exception is that the use of the good faith rationale in certain circumstances would not subvert the principal purpose of the exclusionary rule, which is to discourage future official misconduct by proscribing the use at trial of unlawfully obtained evidence. In the present case, the sheriff's deputies reentered the house only after they had received permission from Judge Coombs, who had ordered the house sealed and had ordered the deputies to conduct an investigation. (R.T. of Aug. 6, 1974, at 98-100.) Further, Arizona law at that time did not require a warrant in situations such as this. State v. Duke, supra, State v. Sample, supra. Application of the exclusionary rule to such a situation would not further the purpose of the exclusionary rule. This Court should therefore hold

that the evidence was admissible under the good faith exception.

4. Admission of the Coleman lantern and the Coleman can was harmless error. When evidence is erroneously admitted, reversal is not required if it can be said beyond a reasonable doubt that the evidence had no influence on the verdict by the jurors. Chapman v. California, 386 U.S. 18, 22-23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, (1967). In the present case, numerous witnesses testified about the presence of a Coleman lantern in the bathroom. (R.T. of Oct. 24, 1974, at 48; R.T. of Oct. 28, 1974, at 49; R.T. of Nov. 12, 1974, at 123.) The state introduced without objection a photograph of the lantern in the bathroom (Exhibit 36). (R.T. of Oct. 24, 1974, at 40-41; R.T. of Oct. 28, 1974, at 24.) When the state first offered the Coleman lantern in evidence, petitioner's counsel did not object. (R.T. of Oct. 28, 1974, at 25.) In light of all this testimony about the lantern and the photograph of it in the house, there is no way that the introduction of the lantern itself could have had any effect on the juror's verdict. Its admission therefore would have been harmless error.

The witnesses also mentioned many times the presence of the full can of Coleman fuel in the living room. (R.T. of Oct. 23, 1974, at 44, 62; R.T. of Oct. 24, 1974, at 45-48, 63-64; R.T. of Oct. 29, 1974, at 4, 70; R.T. of Oct. 30, 1974, at 9.) Because this can was full, it could not have been used in the fire. The only thing that removal of the can allowed the police to do was to run a fingerprint test on the can; the results, however, were inconclusive and were only that the can had smudged prints on it that would be comparable to adult prints, and that it had no

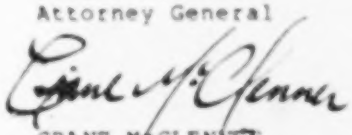
children's prints in it. (R.T. of Oct. 31, 1974, at 173.) Again, there is no way this evidence would have had any effect on the juror's verdict. Its admission too would have been harmless error.

CONCLUSION

For all of the above-stated reasons, respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



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EXHIBITS ADMITTED IN EVIDENCE

Number	Identified	Offered by	Admitted	Description
1	10-23-74, at 60 10-28-74, at 113	Plaintiff	10-28-74, at 119	Photograph of victim Linda
2	10-23-74, at 60 10-28-74, at 115	Plaintiff	10-28-74, at 119	Photograph of victim Iona
3	10-24-74, at 58	Plaintiff	10-23-74, at 67	Diagram of house
6	10-24-74, at 68	Plaintiff	10-24-74, at 39	Photograph of north wall of bedroom
7	10-24-74, at 66	Plaintiff	10-24-74, at 39	Photograph showing west side of bedrrom
8	10-24-74, at 69 10-28-74, at 23	Plaintiff	10-24-74, at 39	Photograph of northwest corner of bedroom
9	10-28-74, at 17	Plaintiff	10-24-74, at 39	Photograph of northwest corner of room
10	10-28-74, at 15 10-29-74, at 94	Plaintiff	10-24-74, at 39	Photograph of door into bedroom
11	10-24-74, at 68 10-28-74, at 13	Plaintiff	10-24-74, at 39	Photograph of door into bedroom
18	10-29-74, at 66	Plaintiff	10-24-74, at 39	Photograph of living room closet door
19		Plaintiff	10-24-74, at 39	Photograph
20	10-24-74, at 43 10-28-74, at 45	Plaintiff	10-24-74, at 39	Photograph of closet in living room
21	10-28-74, at 19 10-29-74, at 91	Plaintiff	10-24-74, at 39	Photograph taken in hall
22		Plaintiff	10-24-74, at 39	Photograph
23		Plaintiff	10-24-74, at 39	Photograph
24	10-28-74, at 28	Plaintiff	10-28-74, at 29	Coleman fuel can and funnel from bookcase
25	10-24-74, at 31, 10-28-74, at 29 10-31-74, at 8	Plaintiff	10-28-74, at 29	Coleman fuel can found in living room closet
27	10-29-74, at 4 10-31-74, at 10	Defendant	10-31-74, at 10	Piece of carpeting from master bedroom
28	10-28-74, at 10, 12 10-31-74, at 6	Plaintiff	10-28-74, at 12	Material sample from room

EXHIBIT "A"

Number	Identified	Offered by	Admitted	Description
29	10-28-74, at 10, 12 10-31-74, at 6	Plaintiff	10-28-74, at 12	Material sample from room
30	10-28-74, at 10, 12 10-31-74, at 6	Plaintiff	10-28-74, at 12	Material sample from room
32	10-28-74, at 23	Plaintiff	10-23-74, at 69	Photographs of scene on 11-16-73
36	10-28-74, at 24	Plaintiff	10-24-74, at 41	Photograph of bathroom and Coleman lantern
37	10-24-74, at 38	Plaintiff	10-24-74, at 40	Photograph of closet in bedroom
42	10-24-74, at 36, 70, 72 10-28-74, at 22	Plaintiff	10-24-74, at 37	Photograph of wall in bedroom
43	10-24-74, at 36, 71 10-28-74, at 23, 105	Plaintiff	10-24-74, at 37	Photograph of room before removal of bodies
44	10-24-74, at 36, 70	Plaintiff	10-24-74, at 37	Photograph of room before removal of bodies
50	10-31-74, at 44	Plaintiff	10-31-74, at 45	Coleman can by door
51	10-28-74, at 25 10-31-74, at 46, 71	Plaintiff	10-28-74, at 25	Coleman lantern
56		Plaintiff	10-24-74, at 37	Baggie containing ashes
57		Plaintiff	10-24-74, at 37	Baggie with envelope
58	10-24-74, at 34 10-28-74, at 53	Plaintiff	10-24-74, at 37	Photograph of box springs
59	10-24-74, at 33, 67	Plaintiff	10-24-74, at 34	Photograph of a portion bed
60	10-24-74, at 33, 66	Plaintiff	10-24-74, at 34	Photograph of box springs
62	10-24-74, at 32, 66 10-28-74, at 18	Plaintiff	10-24-74, at 33	Photograph of bedroom window
64		Plaintiff	10-24-74, at 39	Photograph
65	10-24-74, at 49	Plaintiff	10-24-74, at 39	Photograph of burn patterns in tile
66	10-24-74, at 49	Plaintiff	10-24-74, at 39	Photograph

Number	Identified	Offered by	Admitted	Description
67	10-24-74, at 49 10-28-74, at 16 10-30-74, at 85 11-7-74, at 12	Plaintiff	10-24-74, at 39	Photograph of closet door
68	10-24-74, at 49, 65	Plaintiff	10-24-74, at 39	Photograph
69	10-30-74, at 79 11-7-74, at 13	Plaintiff	10-24-74, at 39	Photograph of children's closet (close up)
72	10-23-74, at 69 10-24-74, at 72 10-28-74, at 105	Plaintiff	10-23-74, at 69	Photographs of scene on 11-16-73
75	11-6-74, at 96	Plaintiff	11-6-74, at 97	Manilla envelope containing envelopes
76	11-6-74, at 98 11-12-74, at 120	Defendant	11-12-74, at 131	Letter addressed to Stameys
77	11-7-74, at 14	Defendant	11-7-74, at 15	Photograph of beds
78	11-7-74, at 14	Defendant	11-7-74, at 14	Photograph of room
82	11-7-74, at 33	Defendant	11-7-74, at 34	Photograph of southwest corner of room
87	11-7-74, at 26	Defendant	11-7-74, at 27	Photograph of pieces of carpet
89	11-7-74, at 26	Defendant	11-7-74, at 28	Photograph of pieces ofcarpet and bed springs
90	11-7-74, at 26	Defendant	11-7-74, at 27	Photograph of pieces of carpet
109	11-7-74, at 25 11-12-74, at 123	Defendant	11-7-74, at 26	Photograph of kitchen
124	10-28-74, at 106 10-30-74, at 46, 69	Defendant	10-30-74, at 69	Photograph
131	11-7-74, at 22	Defendant	11-7-74, at 55	Photograph of room
132	11-7-74, at 15	Defendant	11-7-74, at 21	Photograph of room
136	11-7-74, at 35	Defendant	11-7-74, at 46	Model of bedroom
139	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
140	10-31-74, at 21	Plaintiff	11-31-74, at 24	Gastromatograph graph
141	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
142	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph

Number	Identified	Offered by	Admitted	Description
143	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
144	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
145	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
146	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
147	10-29-74, at 3	Defendant	10-29-74, at 3	Photograph in living room
149	10-28-74, at 6	Plaintiff	10-24-74, at 39	Photograph of living room closet door
153	10-24-74, at 72 10-28-74, at 25	Plaintiff	10-24-74, at 39	Photograph looking into rafters
154	10-28-74, at 12	Plaintiff	10-24-74, at 39	Photograph of doorway into room
155	10-31-74, at 24	Plaintiff	10-31-74, at 24	Logarithmic scale
156		Defendant	11-7-74, at 84	Figures on easel
157	11-12-74, at 112	Defendant	11-12-74, at 113	Film of morning of fire
158	11-14-74, at 109	Defendant	11-14-74, at 109	Transcript of conversation between defendant and insurance agent.

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS
BONDS - REVOKE
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, X. Dollins

CR 78779

STATE OF ARIZONA

vs.

JOHN HENRY KNAPP

Attorney General
by: Crane McClennan

James E. Scarboro/Larry A. Hamm
Mark S. Wallace/Parker C. Fo

Having been submitted for initial review pursuant to Rule 32, the Court has carefully read the petition, the response and the repl The Court has also reviewed the court files in the matter.

Defendant alleges the trial court erred in refusing to allot funds to defendant's expert to XXXXconstruct a full scale replica of the room in which the fire took place. PUrsuant to Rule 32, defendant is precluded from now raising this issue as it was raised in his fifth appeal and decided adversely to defendant's position.

Defendant alleges the trial court erred in excluding evidence of the experiments conducted by defendant's expert. This matter was carefully addressed on the record by the trial court and the ruling could have been tested on appeal. It is now waived by failu to raise on appeal or precluded by having been already decided.

Defendant contends that it is the combination of the foregoing two alleged errors that is itself the error. These matters were known to defendant at the time of the appeal and the first PCR. The matters are carefully documented in the record. Defendant has waived this argument by failing to timely raise it heretofore.

Defendant alleges this confession was not voluntary. This iss was raised in defendant's first appeal and the Court decided against him. He is now precluded from raising this issue.

Defendant alleges the evidence was illegally seized from the trailer after the date of the fire and that he has not waived this issue because there has been a change in the law since his trial. A careful review of the record shows only two items seized after the day of the fire - a full can of Coleman fuel from the living room and the Coleman lantern found in the bathroom. Pictures of these items were taken in place on the day of the fire and the

(continued)

Exhibit B

OFFICE DISTRIBUTION

APPEALS
BONDS - RELEASE
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, Clerk
By Date (Judge) (Commissioner) K. Dollins Deputy

CR 78779 STATE v. KNAPP *(continued)

clear and supports the constitutionality of this statute.

3. The sentencing court's failure to consider doubt as to defendant's guilt as a mitigating factor. The record in this regar is lengthy and clear. The sentencing judge did not feel that he could consider this matter as a mitigating factor, but stated that even if he could, he did not consider the matter mitigating. The matter was squarely before the XXXXXXX appellate court on appeal and is not now properly raised in a Rule 32 proceeding.

4. The sentencing court erred in finding defendant acted in a heinous, cruel or depraved manner under the Arizona definition. This claim has been rejected in Gretzler and the appellate decisior herein.

5. The capital sentencing statute is unconstitutional for failure to establish the burden of proof. Inasmuch as the state proved the aggravating factor "burning a child to death" beyond a reasonable doubt and the sentencing court found this to be "heinou cruel or depraved" and the appellate court agreed, this issue does not apply in this case.

6, 7 and 8. The defendant had a right to sentencing by a jury This claim has been rejected in Gretzler.

Based upon the foregoing analysis, there is no questions of law or fact raised upon which defendant might obtain relief and ,

IT IS ORDERED denying defendant's petition for post convictior relief.

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS
BONDS - REFUND
ADMIN.
CHANGE OF VENUE
JURY FEES
REWARDS
SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, Clerk
K. Dollins, Deputy

CR 78779 STATE v. KNAPP (continued)

pictures were admitted without objection. Many witnesses described the items having seen them during and immediately after the fire. The testimony was without objection. Even if seized illegally, a fact which need not be decided here, the admission of the items themselves was harmless in view of the pictures and the testimony.

Defendant alleges the items seized the day of the fire were illegally seized. This issue was raised initially in writing in the trial court but abandoned during argument and never again raised until this PCR. There is no issue of fact in dispute as to the ~~XX~~items and times of seizure and circumstances of seizure and a study of the authorities cited in the arguments made herein does not favor defendant's position and thus this issue does not form the basis for relief for defendant.

Defendant alleges the Arizona Supreme Court did not conduct an appropriate review of his sentence as it failed to make a peoportic review. This Court has no jurisdiction to rule that the Arizona Supreme Court erred. A review of both opinions indicates the Court knew what its job was and set about doing it.

As to his contentions regarding errors in sentencing, defendan alleges:

1. The Arizona Supreme Court failed to conduct a proportional review - both where the death penalty was imposed, as well as where there was a life sentence. The record has been quoted extensively by both parties from the record on each of the appeals herein. The Supreme Court obviously knew its job, did it as it saw it and this trial court is in no legal position to take issue with its findings.

2. The Arizona Capital sentencing statute is constitutionally infirm because: (a) it does not provide adequate guidance to the trial court in imposing sentence. Gretzler rule to the contrary. (b) for failure to require the State to prove beyond a reasonable doubt that ~~X~~aggravating factors exist and outweigh the mitigating factors. The law does not support this allegation. (c) it requires death penalty if the State proves one or more aggravating factors defendant is unable to show sufficient mitigating factors. The la

(continued)

S. ALAN COOK
CLERK

ANNA L. CATES
CHIEF DEPUTY CLERK

Supreme Court

STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

October 19, 1983

STATE OF ARIZONA, Appellee, vs. JOHN HENRY KNAPP, Appellant.	Supreme Court No. 3106-2-PC Maricopa County No. CR-78779

The following action was taken by the Supreme Court of the State of Arizona on October 18, 1983 in regard to the above-entitled cause:

"ORDERED: Petition for Review - DENIED.
FURTHER ORDERED: Motion for Oral Argument - DENIED.
FURTHER ORDERED: The Stay heretofore entered is vacated.

Justice Stanley G. Feldman voting to grant both petition and motion."

Record on Petition for Post Conviction Relief returned to Maricopa County Superior Court this 19th day of October, 1983, to wit: Instruments (3 Parts); Minute Entries.

S. ALAN COOK, Clerk

By Kathleen E. Kemplen
Deputy Clerk

TO:
James E. Scarboro, Esq., Mark S. Wallace, Esq., and Parker C. Folse III, Esq., Martori, Meyer, Hendricks & Victor, 2700 North Third Street, Suite 4000, Phoenix, Arizona 85004
Hon. Robert K. Corbin, Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007 Attn: Crane McClennen
Thomas E. Collins, Maricopa County Attorney, 101 West Jefferson Street, Phoenix, Arizona 85003
Hon. Marilyn A. Riddell, Judge, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003
Vivian Kringle, Clerk, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003 (Certified Copy)
John Henry Knapp, Box B 33659, Arizona State Prison, Florence, Arizona 85232

Exhibit C

Supreme Court, U.S.
FILED
FEB 7 1984
ALEXANDER L. STEVAS
CLERK

FEB 17 PAGE 311

No. 83-5942

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF ARIZONA

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ATTORNEYS FOR PETITIONER

MARTONE, MEYER HENDRICKS & VICTOR

No. 83-5942

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF ARIZONA

After the petition for a writ of certiorari was filed, this Court handed down its decision in Michigan v. Clifford, 52 U.S.L.W. 4056 (Jan. 11, 1984), reaffirming that the Fourth Amendment warrant requirement is applicable to searches of houses damaged by fire and further defining the circumstances justifying warrantless intrusions. The Clifford decision confirms that the courts below misapplied the law in this case.

Prior to his first trial Petitioner Knapp asked for an evidentiary hearing on the circumstances under which items had been seized by fire and police officials in warrantless searches of petitioner's fire-damaged residence on successive occasions after the day of the fire. The trial court viewed a suppression hearing as unnecessary, holding that no warrant was required because police had properly taken possession of the

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MARTONI, MEYER HENDRICKS & VICTOR

premises as evidence and petitioner and his wife did not live there after the fire. 8/7/84 R.T. at 96; 8/8/74 R.T. at 3.

In the post-conviction proceeding at issue here, the trial court likewise declined to hold an evidentiary hearing and held categorically that all the warrantless searches and seizures, both on the day of the fire and thereafter, were constitutional. Appendix II to Petition for Writ of Certiorari. With respect to some, but not all, of the evidence, the court found that the error, if any, in admitting the evidence was harmless. Id.

Clifford permits a warrantless search to extinguish a fire and determine its cause but not to conduct a post-fire arson investigation. In petitioner's case firemen entered his residence to extinguish the fire and ascertain its cause, but arson experts were also called in to conduct a criminal investigation on the day of the fire and thereafter. Because no suppression hearing was held below, the record does not make clear what evidence was seized pursuant to the initial entry and what was seized pursuant to the arson investigation.

The State's recitation of facts in its response to the certiorari petition may create the impression that a suppression hearing was held. The State's narrative is gleaned from the second trial, which took place after the disputed evidence had been held admissible. Questioning by the prosecution and defense did not focus upon who conducted the searches or their purpose or whether officials were continuously present.

The categorical approach adopted by the courts below is impermissible both under Clifford and under prior rulings from this Court, and because the state did not ask for or conduct an evidentiary hearing it cannot meet its burden of proving that exigent circumstances justified dispensing with the warrant requirement. To determine how Clifford and its predecessors

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apply to this case, an evidentiary hearing will be necessary.

In its response the State argues that petitioner waived his right to challenge the admission of evidence seized on the day of the fire.* The same argument was made to the Maricopa County, Arizona, Superior Court, but no finding of waiver was made. Appendix II to Petition for Writ of Certiorari. Instead, the Court reached the merits and rejected petitioner's constitutional argument. Without a finding of waiver, there is no adequate and independent state ground barring review by this Court. Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

Because the court below applied an incorrect legal standard, petitioner requests that his petition for certiorari be granted, that the judgment under review be reversed, and that the case be remanded for further proceedings not inconsistent with Michigan v. Clifford.

Alternatively, petitioner requests that the judgment below be vacated and that the case be remanded for reconsideration in light of Michigan v. Clifford.

DATED this 3rd day of February, 1984.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____
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2700 North Third Street
Phoenix, Arizona 85004

ATTORNEY OF RECORD

Mark S. Wallace
Colin F. Campbell
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hoenix, Arizona 85004

ATTORNEYS FOR PETITIONER

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*Most of the arguments the State makes in its response were also made in its Opposition to Petitioner's Stay of Execution in Case No. A-358. Those arguments were answered in petitioner's reply. Petitioner's execution was stayed by the United States District Court, District of Arizona, after petitioner filed a habeas corpus petition raising non-Fourth Amendment issues.

MARTORI, MEYER, HENDRICKS & VICTOR

AFFIDAVIT OF SERVICE

JAMES E. SCARBORO, being first duly sworn, upon oath deposes and says:

That he is a member of the Bar of this Court and that in accordance with Rule 28.2, Supreme Court Rules, the following documents were deposited with Federal Express for mailing, to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and were deposited in a United States post office for mailing, with first-class postage prepaid, to Crane McClennen, Assistant Arizona Attorney General, 1275 West Washington, Second Floor, Phoenix, Arizona 85007, on this 3rd day of February, 1984.

(a) Reply to Response to Petition for Writ of Certiorari to the Superior Court of the State of Arizona; and

(b) Affidavit of Service

James E. Scarboro
JAMES E. SCARBORO

SUBSCRIBED AND SWORN to before me this 3rd day of February, 1984, by James E. Scarboro.

Notary Public

My Commission Expires:

My Commission Expires Feb 22 1987

MARTONE MEYER MENDOZA & VICTOR